

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MARCO GUZMAN,

Petitioner,

v.

ATTORNEY GENERAL, *et al.*,

Respondents.

Case No. 3:17-cv-00515-HDM-CLB

ORDER

I. SUMMARY

This action is a petition for a writ of habeas corpus by Marco Guzman, an individual incarcerated at Nevada's High Desert State Prison. Guzman is represented by appointed counsel. Respondents have filed a motion to dismiss. Guzman filed an opposition to the motion to dismiss, as well as a related motion for leave to conduct discovery. The Court will deny Respondents' motion to dismiss and Guzman's motion for leave to conduct discovery and will set a schedule for Respondents to file an answer.

II. BACKGROUND

Guzman was convicted in 2012, following a jury trial, in Nevada's Eighth Judicial District Court (Clark County), of one count of second-degree murder with use of a deadly weapon and one count of first-degree murder with use of a deadly weapon. See Judgment of Conviction, Exh. 15 (ECF No. 14-15). For the second-degree murder, Guzman was sentenced to life in prison with the possibility of parole after 120 months plus a consecutive term of 12 to 240 months for use of the deadly weapon; for the first-degree murder, he was sentenced to life in prison with the possibility of parole after 240 months plus a consecutive term of 12 to 240 months for use of the deadly weapon. See

1 id. The sentences for the two murders are to be served consecutively. *See id.* The
2 judgement of conviction was filed on December 10, 2012. *See id.*

3 Guzman appealed. *See* Appellant's Opening Brief, Exh. 16 (ECF No. 14-16);
4 Appellant's Reply Brief, Exh. 18 (ECF No. 15-2). The Nevada Supreme Court affirmed
5 on October 29, 2014. *See* Order of Affirmance, Exh. 19 (ECF No. 15-3).

6 On December 16, 2014, Guzman filed a counseled petition for writ of habeas
7 corpus in the state district court. Petition for Writ of Habeas Corpus (Post-Conviction),
8 Exh. 21 (ECF No. 15-5). The court conducted an evidentiary hearing (*see* Transcript,
9 Exh. 74 (ECF No. 24-41)) and denied Guzman's petition in a written order filed
10 February 10, 2016. *See* Findings of Fact, Conclusions of Law and Order, Exh. 25 (ECF
11 No. 15-9, pp. 3–7). Guzman appealed. *See* Appellant's Opening Brief, Exh. 26 (ECF
12 No. 15-10); Appellant's Reply Brief, Exh. 28 (ECF No. 15-12). The Nevada Supreme
13 Court affirmed the denial of Guzman's petition on June 15, 2017. *See* Order of
14 Affirmance, Exh. 29 (ECF No. 15-13).

15 This Court received from Guzman a pro se petition for writ of habeas corpus
16 (ECF No. 4), initiating this action, on August 25, 2017. The Court granted Guzman's
17 motion for appointment of counsel and appointed counsel to represent him. *See* Order
18 entered August 31, 2017 (ECF No. 3). With counsel, Guzman filed a first amended
19 petition for writ of habeas corpus on April 2, 2018 (ECF No. 13) and a second amended
20 petition on June 18, 2018 (ECF No. 27). Respondents filed a motion to dismiss
21 Guzman's second amended petition (ECF No. 28), and Guzman filed a related motion
22 for leave to conduct discovery (ECF No. 33). Both of those motions were denied without
23 prejudice after Guzman indicated his intention to request a stay of the action to further
24 exhaust claims in state court. *See* Order entered February 19, 2019 (ECF No. 40).
25 Guzman filed a motion for stay (ECF No. 41), and the Court granted that motion and
26 stayed the action on June 6, 2019, pending state-court proceedings. *See* Order entered
27 June 6, 2019 (ECF No. 44).
28

On May 10, 2019, Guzman filed a petition for writ of habeas corpus in the state district court, initiating a second state habeas action. See Petition for Writ of Habeas Corpus, Exh. 37 (ECF No. 48-1). On August 13, 2019, the court denied Guzman's petition, ruling that all his claims were procedurally barred. See Findings of Fact, Conclusions of Law, and Order, Exh. 43 (ECF No. 48-7). Guzman appealed. See Appellant's Opening Brief, Exh. 45 (ECF No. 48-9); Appellant's Reply Brief, Exh. 47 (ECF No. 48-11). On November 3, 2020, the Nevada Supreme Court affirmed. See Order of Affirmance, Exh. 53 (ECF No. 48-17).

On January 19, 2021, the stay of this action was then lifted (ECF No. 54), and Guzman filed a third amended petition for writ of habeas corpus (ECF No. 55). Guzman's third amended habeas petition, now his operative petition, includes the following claims:

Ground 1: Guzman's federal constitutional rights were violated because "[t]rial counsel conceded Mr. Guzman was guilty of second degree murder."

Ground 2: Guzman's federal constitutional rights were violated because the State presented insufficient evidence to convict him of murder.

Ground 2A: "Mr. Guzman is guilty only of voluntary manslaughter" for the killing of Anthony Dickerson ("Tony").

Ground 2B: "Mr. Guzman is guilty only of voluntary manslaughter" for the killing of Tameron Clewis ("Tammy").

Ground 3: Guzman's federal constitutional rights were violated on account of ineffective assistance of counsel because his appellate counsel "fail[ed] to argue the State presented insufficient evidence to convict Mr. Guzman of first degree murder regarding Tammy."

Ground 4: Guzman's federal constitutional rights were violated on account of ineffective assistance of counsel because his trial counsel failed to seek directed verdicts.

Ground 5: Guzman's federal constitutional rights were violated on account of ineffective assistance of counsel because his trial counsel "conced[ed] Mr. Guzman was guilty of second degree murder."

Ground 6: Guzman's federal constitutional rights were violated on account of ineffective assistance of counsel because his trial counsel failed to consult with and hire expert witnesses.

Ground 6A: “Trial counsel should’ve called a physician to discuss Mr. Guzman’s hand injury.”

Ground 6B: “Trial counsel should’ve called a self-defense expert.”

Ground 6C: “Trial counsel should’ve called an expert regarding meth.”

Ground 7: Guzman’s federal constitutional rights were violated on account of ineffective assistance of counsel because his trial counsel failed to challenge Jury Instruction 26.

Ground 8: Guzman’s federal constitutional rights were violated because “[j]ury instruction 26 was fundamentally unfair.”

Ground 9: Guzman’s federal constitutional rights were violated because “[t]rial counsel failed to communicate a favorable plea offer to Mr. Guzman.”

Ground 10: Guzman’s federal constitutional rights were violated because “[t]he State failed to disclose material exculpatory information regarding its key witness and allowed that witness to testify falsely.”

Ground 11: Guzman’s federal constitutional rights were violated on account of ineffective assistance of counsel because his trial counsel “fail[ed] to investigate and present evidence regarding whether the State extended a favorable deal to a witness.”

Third Amended Petition for Writ of Habeas Corpus (ECF No. 55), pp. 10–30.

Respondents filed their motion to dismiss on July 27, 2021 (ECF No. 63), contending that all of Guzman’s claims are procedurally defaulted and that Ground 9 is inadequately pled and conclusory. Guzman filed an opposition to the motion to dismiss (ECF No. 69) and a motion for leave to conduct discovery (ECF No. 70).

Under the scheduling order in the case (ECF No. 54), Respondents originally had 30 days to file a reply in support of their motion to dismiss and a response to the motion for leave to conduct discovery. Respondents filed a motion for extension of that deadline, requesting an additional 33 days, stating generally that the extension was necessary because of the “demands of [counsel’s] current caseload” (ECF No. 71). The Court granted that motion for extension of time in part; the Court found that, under the circumstances the 33 days requested was excessive, and the Court granted Respondents a 25-day extension, to February 14, 2022 (ECF No. 72). That order stated that this briefing schedule would not be further extended (ECF No. 72, p. 2). On

February 14, 2022, Respondents filed another motion for extension of time (ECF No. 73). Without mentioning the warning given by the Court in the previous order, Respondents' counsel requests another 14 days, stating she needs this extension because she is "currently ill" and was unable to complete the reply regarding the motion to dismiss and the response to the discovery motion by February 14, and adding that the 14-day extension she requests may not be enough (ECF No. 73, p. 4). The Court will deny the motion for extension of time. The Court has examined Respondents' motion to dismiss and Guzman's motion for leave to conduct discovery and determines that further briefing is unnecessary. The Court denies the motion to dismiss in all respects. With six exceptions, the Court's ruling on the defenses asserted by Respondents—that all Guzman's claims are procedural default and that one of his claims fails because it is inadequately pled and conclusory—is deferred until after Respondents file an answer and Guzman a reply. The exceptions involve the question of the procedural default of the claims in Grounds 1, 2A, 5, 6A, 6B and 6C; the Court determines, from the record and without need for further briefing, that those claims are not procedurally defaulted because they were ruled upon by the Nevada Supreme Court on their merits. The Court denies Guzman's motion for leave to conduct discovery, without prejudice, in all respects.

III. DISCUSSION

A. Procedural Default – Legal Standards

A federal court will not review a claim for habeas corpus relief if the decision of the state court denying the claim rested on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730–31 (1991). The Court in *Coleman* stated the effect of a procedural default as follows:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a

1 result of the alleged violation of federal law, or demonstrate that failure to
2 consider the claims will result in a fundamental miscarriage of justice.

3 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). A
4 state procedural bar is “independent” if the state court explicitly invokes the procedural
5 rule as a separate basis for its decision. *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9th
6 Cir. 1995). A state court’s decision is not “independent” if the application of a state’s
7 default rule depends on a consideration of federal law. *Park v. California*, 202 F.3d
8 1146, 1152 (9th Cir. 2000). A state procedural rule is “adequate” if it is “clear,
9 consistently applied, and well-established at the time of the petitioner’s purported
10 default.” *Calderon v. United States Dist. Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir.
11 1996) (citation and internal quotation marks omitted). A discretionary state procedural
12 rule can serve as an adequate ground to bar federal habeas review because, even if
13 discretionary, it can still be “firmly established” and “regularly followed.” *Beard v.*
14 *Kindler*, 558 U.S. 53, 60–61 (2009). Also, a rule is not automatically inadequate “upon a
15 showing of seeming inconsistencies” given that a state court must be allowed discretion
16 “to avoid the harsh results that sometimes attend consistent application of an unyielding
17 rule.” *Walker v. Martin*, 562 U.S. 307, 320 (2011).

18 To demonstrate cause for a procedural default, the petitioner must “show that
19 some objective factor external to the defense impeded” his efforts to comply with the
20 state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external
21 impediment must have prevented the petitioner from raising the claim. *See McCleskey*
22 *v. Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner
23 bears “the burden of showing not merely that the errors [complained of] constituted a
24 possibility of prejudice, but that they worked to his actual and substantial disadvantage,
25 infecting his entire [proceeding] with errors of constitutional dimension.” *White v. Lewis*,
26 874 F.2d 599, 603 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170
(1982).

27 In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective
28 assistance of post-conviction counsel may serve as cause, to overcome the procedural

1 default of a claim of ineffective assistance of trial counsel. In *Martinez*, the Supreme
 2 Court noted that it had previously held, in *Coleman*, that “an attorney’s negligence in a
 3 postconviction proceeding does not establish cause” to excuse a procedural default.
 4 *Martinez*, 566 U.S. at 15. The *Martinez* Court, however, “qualif[ied] *Coleman* by
 5 recognizing a narrow exception: inadequate assistance of counsel at initial-review
 6 collateral proceedings may establish cause for a prisoner’s procedural default of a claim
 7 of ineffective assistance at trial.” *Id.* at 9. The Court described “initial-review collateral
 8 proceedings” as “collateral proceedings which provide the first occasion to raise a claim
 9 of ineffective assistance at trial.” *Id.* at 8.

10 **B. Ground 1**

11 In Ground 1, Guzman claims that his federal constitutional rights were violated
 12 because “[t]rial counsel conceded Mr. Guzman was guilty of second degree murder.”
 13 Third Amended Petition (ECF No. 55), pp. 10–12. Guzman claims that the concession
 14 by his trial counsel violated his federal constitutional rights under the United States
 15 Supreme Court’s holding in *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). *See id.*

16 Guzman did not assert this claim, as a claim under *McCoy* as opposed to an
 17 ineffective assistance of counsel claim, on his direct appeal or in his first state habeas
 18 action. *See* Appellant’s Opening Brief, Exh. 16 (ECF No. 14-16); Appellant’s Reply
 19 Brief, Exh. 18 (ECF No. 15-2); Petition for Writ of Habeas Corpus (Post-Conviction),
 20 Exh. 21 (ECF No. 15-5); Appellant’s Opening Brief, Exh. 26 (ECF No. 15-10);
 21 Appellant’s Reply Brief, Exh. 28 (ECF No. 15-12). He did assert this claim, under
 22 *McCoy*, in his second state habeas action. *See* Petition for Writ of Habeas Corpus, Exh.
 23 37, pp. 17–20 (ECF No. 48-1, pp. 18–21); Appellant’s Opening Brief, Exh. 45, pp. 11–33
 24 (ECF No. 48-9, pp. 24–46). The Nevada Supreme Court ruled the claim barred by the
 25 Nevada law of the case doctrine. Order of Affirmance, Exh. 53, pp. 1–2 (ECF No. 48-27,
 26 pp. 2–3).

27 Guzman argues that this claim is not procedurally defaulted because the ruling of
 28 the Nevada Supreme Court on the claim, in his second state habeas action, was based

1 on interwoven state and federal law. See Opposition to Motion to Dismiss (ECF No. 69),
2 pp. 2–4.

3 The Court agrees that the claim in Ground 1 is not procedurally defaulted, but for
4 a reason slightly different from that articulated by Guzman: the claim was ruled upon by
5 the Nevada Supreme Court on its merits. In its ruling on this claim on the appeal in
6 Guzman’s second state habeas action, the Nevada Supreme Court looked back to a
7 conclusion it reached in ruling on Guzman’s related ineffective assistance of counsel
8 claim on the appeal in Guzman’s first state habeas action—that “counsel did not
9 concede that Guzman was guilty of second-degree murder”—and ruled that under the
10 Nevada law of the case doctrine, Guzman’s claim based on *McCoy*, in his second state
11 habeas action, therefore failed. See Order of Affirmance, Exh. 53, pp. 1–2 (ECF No. 48-
12 27, pp. 2–3). This amounted to a ruling on the merits of the claim, and, consequently,
13 the claim is not barred in this action under the procedural default doctrine.

14 **C. Ground 2A**

15 In Ground 2A, Guzman claims that there was insufficient evidence presented at
16 trial to convict him of second-degree murder for the killing of Anthony Dickerson
17 (“Tony”). Third Amended Petition (ECF No. 55), pp. 12–14. This claim is not
18 procedurally defaulted, as Guzman asserted it on his direct appeal, and the Nevada
19 Supreme Court ruled on its merits. See Appellant’s Opening Brief, Exh. 16, pp. 18–19
20 (ECF No. 14-16, pp. 24–25); Order of Affirmance, Exh. 19, p. 2 (ECF No. 15-3, p. 3).

21 **D. Ground 2B**

22 In Ground 2B, Guzman claims that there was insufficient evidence presented at
23 trial to convict him of first-degree murder for the killing of Tameron Clewis (“Tammy”).
24 Third Amended Petition (ECF No. 55), p. 15.

25 Guzman did not assert this claim on his direct appeal or in his first state habeas
26 action. See Appellant’s Opening Brief, Exh. 16 (ECF No. 14-16); Appellant’s Reply
27 Brief, Exh. 18 (ECF No. 15-2); Petition for Writ of Habeas Corpus (Post-Conviction),
28 Exh. 21 (ECF No. 15-5); Appellant’s Opening Brief, Exh. 26 (ECF No. 15-10);

1 Appellant's Reply Brief, Exh. 28 (ECF No. 15-12). He did, though, assert this claim in
2 his second state habeas action. See Petition for Writ of Habeas Corpus, Exh. 37, pp.
3 20, 22–23 (ECF No. 48-1, pp. 21, 23–24); Appellant's Opening Brief, Exh. 45, pp. 53–62
4 (ECF No. 48-9, pp. 66–75). The Nevada Supreme Court ruled the claim procedurally
5 barred on that appeal. See Order of Affirmance, Exh. 53, p. 3 (ECF No. 48-17, p. 4).

6 Guzman argues that he can show cause and prejudice relative to the procedural
7 default of this claim because of ineffective assistance of his trial counsel, his counsel on
8 his direct appeal, and his counsel in his first state habeas action, for not asserting this
9 claim. See Opposition to Motion to Dismiss (ECF No. 69), pp. 11–13. The Court
10 determines that the issue of the procedural default of this claim is intertwined with the
11 merits of the claim, such that it will be better addressed in conjunction with the merits of
12 Guzman's petition, after Respondents file an answer and Guzman files a reply. The
13 Court also determines that further briefing is warranted with respect to Guzman's
14 argument that there should be an exception to the rule of *Davila v. Davis*, 137 S. Ct.
15 2058 (2017) (*Martinez* does not apply to claims of ineffective assistance of direct appeal
16 counsel) for cases where direct appeal counsel also represents the petitioner in his
17 state post-conviction proceedings; in his further briefing, Guzman should cite whatever
18 authority there is for this proposition. The Court, then, will deny the motion to dismiss as
19 to Ground 2B, without prejudice to Respondents asserting the procedural default
20 defense to the claim in their answer.

21 **E. Ground 3**

22 In Ground 3, Guzman claims that his federal constitutional rights were violated on
23 account of ineffective assistance of counsel because his appellate counsel "fail[ed]
24 to argue the State presented insufficient evidence to convict Mr. Guzman of first degree
25 murder regarding Tammy." Third Amended Petition (ECF No. 55), pp. 15–16.

26 Guzman did not assert this claim in his first state habeas action. See Petition for
27 Writ of Habeas Corpus (Post-Conviction), Exh. 21 (ECF No. 15-5); Appellant's Opening
28 Brief, Exh. 26 (ECF No. 15-10); Appellant's Reply Brief, Exh. 28 (ECF No. 15-12). He

1 did, though, assert this claim in his second state habeas action. See Petition for Writ of
2 Habeas Corpus, Exh. 37, pp. 23–24 (ECF No. 48-1, pp. 24–25); Appellant’s Opening
3 Brief, Exh. 45, pp. 53–62 (ECF No. 48-9, pp. 66–75). The Nevada Supreme Court ruled
4 the claim procedurally barred on that appeal. See Order of Affirmance, Exh. 53, p. 3
5 (ECF No. 48-17, p. 4).

6 Guzman argues that he can show cause and prejudice relative to the procedural
7 default of this claim because of ineffective assistance of his counsel on his direct
8 appeal, and his counsel in his first state habeas action, for not asserting this claim. See
9 Opposition to Motion to Dismiss (ECF No. 69), pp. 11–13. The Court determines that
10 the issue of the procedural default of this claim is intertwined with the merits of the
11 claim, such that it will be better addressed in conjunction with the merits of Guzman’s
12 petition, after Respondents file an answer and Guzman files a reply. Also, here again,
13 further briefing is warranted with respect to Guzman’s argument that there should be an
14 exception to the rule of *Davila v. Davis*, 137 S. Ct. 2058 (2017) (*Martinez* does not apply
15 to claims of ineffective assistance of direct appeal counsel) for cases where direct
16 appeal counsel also represents the petitioner in his state post-conviction proceedings.
17 The Court will deny the motion to dismiss as to Ground 3 without prejudice to
18 Respondents asserting the procedural default defense to the claim in their answer.

19 **F. Ground 4**

20 In Ground 4, Guzman claims that his federal constitutional rights were violated on
21 account of ineffective assistance of counsel because his trial counsel failed to seek
22 directed verdicts. Third Amended Petition (ECF No. 55), p. 17.

23 Guzman did not assert this claim in his first state habeas action. See Petition for
24 Writ of Habeas Corpus (Post-Conviction), Exh. 21 (ECF No. 15-5); Appellant’s Opening
25 Brief, Exh. 26 (ECF No. 15-10); Appellant’s Reply Brief, Exh. 28 (ECF No. 15-12).

26 Guzman did assert this claim in his second state habeas action. See Petition for Writ of
27 Habeas Corpus, Exh. 37, p. 24 (ECF No. 48-1, p. 25); Appellant’s Opening Brief, Exh.
28 45, pp. 53–62 (ECF No. 48-9, pp. 66–75). The Nevada Supreme Court ruled the claim

1 procedurally barred on that appeal. See Order of Affirmance, Exh. 53, p. 3 (ECF No. 48-
2 17, p. 4).

3 Guzman argues that he can show cause and prejudice relative to the procedural
4 default of this claim, under *Martinez*, because of ineffective assistance of his counsel in
5 his first state habeas action, for not asserting this claim. See Opposition to Motion to
6 Dismiss (ECF No. 69), p. 15. The Court determines that the issue of the procedural
7 default of this claim is intertwined with the merits of the claim, such that it will be better
8 addressed in conjunction with the merits of Guzman's petition, after Respondents file an
9 answer and Guzman files a reply. The Court will deny the motion to dismiss as to
10 Ground 4 without prejudice to Respondents asserting the procedural default defense to
11 the claim in their answer.

12 **G. Ground 5**

13 In Ground 5, Guzman claims that his federal constitutional rights were violated on
14 account of ineffective assistance of counsel because his trial counsel "conced[ed] Mr.
15 Guzman was guilty of second degree murder." Third Amended Petition (ECF No. 55),
16 pp. 17–18. This claim is not procedurally defaulted, as Guzman asserted it on the
17 appeal in his first state habeas action, and the Nevada Supreme Court ruled on its
18 merits. See Appellant's Opening Brief, Exh. 26, pp. 25–31 (ECF No. 15-10, pp. 31–37);
19 Order of Affirmance, Exh. 29, pp. 1–2 (ECF No. 15-13, pp. 2–3).

20 **H. Grounds 6A, 6B and 6C**

21 In Grounds 6A, 6B and 6C, Guzman claims that his federal constitutional rights
22 were violated on account of ineffective assistance of counsel because his trial counsel
23 failed to consult with and hire a physician to testify about his hand injury, a self-defense
24 expert, and an expert regarding methamphetamine. Third Amended Petition (ECF No.
25 55), pp. 18–23. These claims are not procedurally defaulted, as Guzman asserted them
26 on the appeal in his first state habeas action, and the Nevada Supreme Court ruled on
27 their merits. See Appellant's Opening Brief, Exh. 26, pp. 18–25 (ECF No. 15-10, pp. 24–
28 31); Order of Affirmance, Exh. 29, pp. 2–3 (ECF No. 15-13, pp. 3–4). Guzman also

1 asserted the claim in Ground 6A on the appeal in his second state habeas action,
 2 proffering new evidence in support of the claim, and the Nevada Supreme Court again
 3 discussed the merits of the claim, and denied relief on it. See Appellant's Opening Brief,
 4 Exh. 45, pp. 33–39 (ECF No. 48-9, pp. 46–52); Order of Affirmance, Exh. 53, p. 2 (ECF
 5 No. 48-17, p. 3).

6 **I. Ground 7**

7 In Ground 7, Guzman claims that his federal constitutional rights were violated on
 8 account of ineffective assistance of counsel because his trial counsel failed to challenge
 9 Jury Instruction 26. Third Amended Petition (ECF No. 55), pp. 23–25. Guzman takes
 10 issue with the part of Jury Instruction 26 that stated: “An honest but unreasonable belief
 11 in the necessity for self-defense does not negate malice and does not reduce the
 12 offense from murder to manslaughter.” See *id.*; see also Jury Instruction 26, Exh. 61
 13 (ECF No. 24-28, p. 27).

14 Guzman did not assert this claim in his first state habeas action. See Petition for
 15 Writ of Habeas Corpus (Post-Conviction), Exh. 21 (ECF No. 15-5); Appellant's Opening
 16 Brief, Exh. 26 (ECF No. 15-10); Appellant's Reply Brief, Exh. 28 (ECF No. 15-12).
 17 Guzman did assert this claim in his second state habeas action. See Petition for Writ of
 18 Habeas Corpus, Exh. 37, pp. 29–31 (ECF No. 48-1, pp. 30–32); Appellant's Opening
 19 Brief, Exh. 45, pp. 53–64 (ECF No. 48-9, pp. 66–77). The Nevada Supreme Court ruled
 20 the claim procedurally barred on that appeal. See Order of Affirmance, Exh. 53, p. 3
 21 (ECF No. 48-17, p. 4).

22 Guzman argues that he can show cause and prejudice relative to the procedural
 23 default of this claim, under *Martinez*, because of ineffective assistance of his counsel in
 24 his first state habeas action, for not asserting this claim. See Opposition to Motion to
 25 Dismiss (ECF No. 69), pp. 15–17. The Court determines that the issue of the procedural
 26 default of this claim is intertwined with the merits of the claim, such that it will be better
 27 addressed in conjunction with the merits of Guzman's petition, after Respondents file an
 28 answer and Guzman files a reply. The Court will deny the motion to dismiss as to

1 Ground 7 without prejudice to Respondents asserting the procedural default defense to
2 the claim in their answer.

3 **J. Ground 8**

4 In Ground 8, Guzman claims that his federal constitutional rights were violated
5 because “[j]ury instruction 26 was fundamentally unfair.” Third Amended Petition (ECF
6 No. 55), p. 25.

7 Guzman did not assert this claim in his first state habeas action. See Petition for
8 Writ of Habeas Corpus (Post-Conviction), Exh. 21 (ECF No. 15-5); Appellant’s Opening
9 Brief, Exh. 26 (ECF No. 15-10); Appellant’s Reply Brief, Exh. 28 (ECF No. 15-12).

10 Guzman did assert this claim in his second state habeas action. See Petition for Writ of
11 Habeas Corpus, Exh. 37, p. 31 (ECF No. 48-1, p. 32); Appellant’s Opening Brief, Exh.
12 45, pp. 53–64 (ECF No. 48-9, pp. 66–77). The Nevada Supreme Court ruled the claim
13 procedurally barred on that appeal. See Order of Affirmance, Exh. 53, p. 3 (ECF No. 48-
14 17, p. 4).

15 Guzman argues that he can show cause and prejudice relative to the procedural
16 default of this claim because of ineffective assistance of his trial counsel, his counsel on
17 his direct appeal, and his counsel in his first state habeas action, for not asserting this
18 claim. See Opposition to Motion to Dismiss (ECF No. 69), p. 17. The Court determines
19 that the issue of the procedural default of this claim is intertwined with the merits of the
20 claim, such that it will be better addressed in conjunction with the merits of Guzman’s
21 petition, after Respondents file an answer and Guzman files a reply. Moreover, here
22 again, further briefing is warranted with respect to Guzman’s argument that there should
23 be an exception to the rule of *Davila v. Davis*, 137 S. Ct. 2058 (2017) (*Martinez* does
24 not apply to claims of ineffective assistance of direct appeal counsel) for cases where
25 direct appeal counsel also represents the petitioner in his state post-conviction
26 proceedings. The Court will deny the motion to dismiss as to Ground 8 without prejudice
27 to Respondents asserting the procedural default defense to the claim in their answer.
28

1 **K. Ground 9**

2 In Ground 9, Guzman claims that his federal constitutional rights were violated
3 because “[t]rial counsel failed to communicate a favorable plea offer to Mr. Guzman.”
4 Third Amended Petition (ECF No. 55), p. 26.

5 Guzman did not assert this claim in his first state habeas action. See Petition for
6 Writ of Habeas Corpus (Post-Conviction), Exh. 21 (ECF No. 15-5); Appellant’s Opening
7 Brief, Exh. 26 (ECF No. 15-10); Appellant’s Reply Brief, Exh. 28 (ECF No. 15-12).
8 Guzman did assert this claim in his second state habeas action. See Petition for Writ of
9 Habeas Corpus, Exh. 37, p. 31 (ECF No. 48-1, p. 32); Appellant’s Opening Brief, Exh.
10 45, pp. 53–65 (ECF No. 48-9, pp. 66–78). The Nevada Supreme Court ruled the claim
11 procedurally barred on that appeal. See Order of Affirmance, Exh. 53, p. 3 (ECF No. 48-
12 17, p. 4).

13 Guzman argues that he may be able to show cause and prejudice relative to the
14 procedural default of this claim, under *Martinez*, because of ineffective assistance of his
15 counsel in his first state habeas action, for not asserting this claim. See Opposition to
16 Motion to Dismiss (ECF No. 69), pp. 17–19. The Court determines that the issue of the
17 procedural default of this claim is intertwined with the merits of the claim, such that it will
18 be better addressed in conjunction with the merits of Guzman’s petition, after
19 Respondents file an answer and Guzman files a reply. The Court will deny the motion to
20 dismiss as to Ground 9 without prejudice to Respondents asserting the procedural
21 default defense to the claim in their answer.

22 Respondents also argue that the claim in Ground 9 is inadequately pled and
23 conclusory, and that it should be dismissed on that additional ground. See Motion to
24 Dismiss (ECF No. 63), pp. 8–10. The Court determines that this issue is also closely
25 related to the question of the merits of the claim, such that it too will be better addressed
26 in conjunction with the merits of Guzman’s petition, after Respondents file an answer
27 and Guzman files a reply. The motion to dismiss as to Ground 9 is denied without
28 prejudice to Respondents asserting this argument in their answer.

1 Guzman requests leave of court to conduct discovery with respect to this claim.
 2 *See id.*; Motion for Leave to Conduct Discovery (ECF No. 70), pp. 7–9. The Court will
 3 deny that request without prejudice. The Court denies the motion to dismiss with
 4 respect to Ground 9 without need for factual development at this time. The discovery
 5 Guzman requests concerns the merits of this claim. *See id.* In the Court’s view,
 6 therefore, it will be more appropriate, and efficient, for any such request for leave to
 7 conduct this discovery to be presented in conjunction with the full briefing of the merits
 8 of the claim. Under the scheduling order in this case, Guzman may file a motion for
 9 leave to conduct discovery concurrently with, but separate from, his reply to
 10 Respondents’ answer. *See* Order entered January 19, 2021 (ECF No. 54), p. 3. The
 11 denial of Guzman’s request for leave to conduct discovery, here, in relation to the
 12 motion to dismiss, is without prejudice to Guzman filing a motion for leave to conduct
 13 this same discovery when he replies to Respondents’ answer, as described in the
 14 scheduling order.

15 **L. Ground 10**

16 In Ground 10, Guzman claims that his federal constitutional rights were violated
 17 because “[t]he State failed to disclose material exculpatory information regarding its key
 18 witness and allowed that witness to testify falsely.” Third Amended Petition (ECF No.
 19 55), pp. 26–30.

20 Guzman did not assert this claim on his direct appeal or in his first state habeas
 21 action. *See* Appellant’s Opening Brief, Exh. 16 (ECF No. 14-16); Appellant’s Reply
 22 Brief, Exh. 18 (ECF No. 15-2); Petition for Writ of Habeas Corpus (Post-Conviction),
 23 Exh. 21 (ECF No. 15-5); Appellant’s Opening Brief, Exh. 26 (ECF No. 15-10);
 24 Appellant’s Reply Brief, Exh. 28 (ECF No. 15-12). He did, though, assert this claim in
 25 his second state habeas action. *See* Petition for Writ of Habeas Corpus, Exh. 37, pp.
 26 32–35 (ECF No. 48-1, pp. 33–36); Appellant’s Opening Brief, Exh. 45, pp. 42–53 (ECF
 27 No. 48-9, pp. 55–66). The Nevada Supreme Court ruled the claim procedurally barred
 28 on that appeal. *See* Order of Affirmance, Exh. 53, p. 3 (ECF No. 48-17, p. 4).

1 Citing *Banks v. Dretke*, 540 U.S. 668, 691–98 (2004), and *Paradis v. Arave*, 130
2 F.3d 385, 394 (9th Cir. 1997), Guzman argues that he can show cause and prejudice
3 regarding the procedural default of this claim, because “the merits of the claim will
4 provide the cause and prejudice.” See Opposition to Motion to Dismiss (ECF No. 69), p.
5 19. The Court determines that the issue of the procedural default of this claim is
6 intertwined with the merits of the claim, such that it will be better addressed in
7 conjunction with the merits of Guzman’s petition, after Respondents file an answer and
8 Guzman files a reply. The Court will deny the motion to dismiss as to Ground 10 without
9 prejudice to Respondents asserting the procedural default defense to the claim in their
10 answer.

11 As with Ground 9, Guzman requests leave of court to conduct discovery with
12 respect to this claim. See *id.*; Motion for Leave to Conduct Discovery (ECF No. 70), pp.
13 5–7. The Court will deny that request without prejudice. The Court denies the motion to
14 dismiss with respect to Ground 10 without need for factual development at this time.
15 The discovery Guzman requests concerns the merits of this claim. See *id.* It will be
16 more appropriate, and efficient, for any such request for leave to conduct this discovery
17 to be presented in conjunction with the full briefing of the merits of the claim. Under the
18 scheduling order in this case, Guzman may file a motion for leave to conduct discovery
19 concurrently with, but separate from, his reply to Respondents’ answer. See Order
20 entered January 19, 2021 (ECF No. 54), p. 3. The denial of Guzman’s request for leave
21 to conduct discovery in relation to the motion to dismiss is without prejudice to Guzman
22 filing a motion for leave to conduct this same discovery when he replies to
23 Respondents’ answer, as described in the scheduling order.

24 **M. Ground 11**

25 In Ground 11, Guzman claims that his federal constitutional rights were violated
26 on account of ineffective assistance of counsel because his trial counsel “fail[ed] to
27 investigate and present evidence regarding whether the State extended a favorable
28 deal to a witness.” Third Amended Petition (ECF No. 55), p. 30.

1 Guzman did not assert this claim in his first state habeas action. See Petition for
2 Writ of Habeas Corpus (Post-Conviction), Exh. 21 (ECF No. 15-5); Appellant's Opening
3 Brief, Exh. 26 (ECF No. 15-10); Appellant's Reply Brief, Exh. 28 (ECF No. 15-12).
4 Guzman did assert this claim in his second state habeas action. See Petition for Writ of
5 Habeas Corpus, Exh. 37, p. 35 (ECF No. 48-1, p. 36); Appellant's Opening Brief, Exh.
6 45, pp. 42–53 (ECF No. 48-9, pp. 55–66). The Nevada Supreme Court, however, ruled
7 the claim procedurally barred on that appeal. See Order of Affirmance, Exh. 53, p. 3
8 (ECF No. 48-17, p. 4).

9 Guzman argues that he may be able to show cause and prejudice relative to the
10 procedural default of this claim, under *Martinez*, because of ineffective assistance of his
11 counsel in his first state habeas action, for not asserting this claim. See Opposition to
12 Motion to Dismiss (ECF No. 69), pp. 19–20. The Court determines that the issue of the
13 procedural default of this claim is intertwined with the merits of the claim, such that it will
14 be better addressed in conjunction with the merits of Guzman's petition, after
15 Respondents file an answer and Guzman files a reply. The Court will deny the motion to
16 dismiss as to Ground 11 without prejudice to Respondents asserting the procedural
17 default defense to the claim in their answer.

18 With respect to this claim too, Guzman requests leave of court to conduct
19 discovery. See *id.*; Motion for Leave to Conduct Discovery (ECF No. 70), pp. 5–7. The
20 Court will deny that request without prejudice. The Court denies the motion to dismiss
21 with respect to Ground 11 without need for factual development at this time. The
22 discovery Guzman requests concerns the merits of this claim. See *id.* It will be more
23 appropriate, and efficient, for any such request for leave to conduct this discovery to be
24 presented in conjunction with the full briefing of the merits of the claim. Under the
25 scheduling order in this case, Guzman may file a motion for leave to conduct discovery
26 concurrently with, but separate from, his reply to Respondents' answer. See Order
27 entered January 19, 2021 (ECF No. 54), p. 3. The denial of Guzman's request for leave
28 to conduct discovery in relation to the motion to dismiss is without prejudice to Guzman

1 filing a motion for leave to conduct this same discovery when he files a reply to
2 Respondents' answer, as described in the scheduling order.

3 **IV. CONCLUSION**

4 **IT IS THEREFORE ORDERED** that Petitioner's Motion for Enlargement of Time
5 (ECF No. 73) is **DENIED**.

6 **IT IS FURTHER ORDERED** that Respondents' Motion to Dismiss (ECF No. 63)
7 is **DENIED**.

8 **IT IS FURTHER ORDERED** that Petitioner's Motion for Leave to Conduct
9 Discovery (ECF No. 70) is **DENIED**.

10 **IT IS FURTHER ORDERED** that Respondents will have 120 days from the date
11 of this order to file an answer.

12 **IT IS FURTHER ORDERED** that, in all other respects, the schedule for further
13 proceedings set forth in the order entered January 19, 2021 (ECF No. 54) will remain in
14 effect.

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16 DATED THIS 24th day of February, 2022.

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HOWARD D. MCKIBBEN
20 UNITED STATES DISTRICT JUDGE
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